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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE CECILIO RIVERA, Defendant and Appellant.	E034735 (Super.Ct.No. INF043347) **OPINION**

APPEAL from the Superior Court of Riverside County. Christopher J. Sheldon and Graham Anderson Cribbs, Judges. Affirmed.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry J. T. Carlton, Supervising Deputy Attorney General, and Jonathan J. Lynn, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant of receiving stolen property (count 1), possession of a stolen check (count 2), misdemeanor driving under the influence (count 3), and possession of a controlled substance (count 4). Defendant admitted three prior convictions alleged pursuant to the three strikes law and three prior convictions for which he had served prison terms, alleged pursuant to Penal Code section 667.5.

The court sentenced defendant to three life terms with 25-year minimums under the three strikes law, but it stayed one of the terms pursuant to Penal Code section 654. The court also imposed six months for the misdemeanor and one year for each prison prior, for a total prison term of 53 years to life. We affirm the judgment.

I

FACTS

A. *Counts 1, 2, and 3*

On or about December 27, 2002, Palm Springs resident Judy Collins wrote a check for her January rent. The check number was 2230 and the amount was $850. Collins typically paid her rent by placing her rent check in an envelope and putting it in her mailbox for collection.

In early January 2003, Collins's landlord called her and said her January rent check had not been received.

On January 10, 2003, about 3:43 a.m., Cathedral City police officer Corwin De Veas observed a car traveling about two miles per hour in a residential area of the city. The speed limit for that area was 25 miles per hour. As De Veas followed the car, it

abruptly pulled to the right without signaling. De Veas activated his overhead lights and made a traffic stop of the car.

Defendant was the driver of the car. There was also a male passenger. Defendant was hostile toward De Veas and appeared aggressive. Before De Veas said anything, defendant questioned why De Veas had pulled him over and asserted he had not done anything wrong. Defendant also said, "You have no right to pull me over." He was breathing very heavily and sweating profusely, and he appeared to be very nervous.

De Veas told defendant he had pulled him over for not signaling when he pulled to the side of the road. Defendant insisted he had signaled.

De Veas noticed that defendant displayed objective symptoms of being under the influence of a controlled substance, mainly a stimulant, and of alcohol. There was an odor of an alcoholic beverage on his person, and he had bloodshot eyes and dilated pupils. In addition, defendant's movements were jerky, and he was extremely aggressive and talkative. When De Veas asked defendant if he had been drinking, defendant said he had had two beers.

De Veas asked defendant for his driver's license. Defendant said his license had been suspended. When defendant stepped out of the car, he sort of stumbled and was staggering, walking from side to side. Defendant refused to perform any field sobriety tests. De Veas concluded defendant was under the influence of a controlled substance and arrested him.

At the police station, De Veas searched defendant's wallet and found a check from Judy Collins to Jorge Carpio.[1] In the "memo" section of the check were the number D5570904 and the notation "Cal." De Veas asked defendant whose check it was and who Judy Collins and Jorge Carpio were. Defendant did not respond, but merely looked angry.

Jorge Carpio had lived with defendant's parents from about August to December of 2002. Defendant would sometimes drive Carpio to work or to run errands. Carpio testified at trial that he did not write any part of the check De Veas found in defendant's wallet and had never seen the check before. However, he confirmed he had an identification card with the number D5570904.

Blood taken from defendant at the time of his arrest tested positive for methamphetamine, in an amount that can cause impairment. The symptoms De Veas noted at the time of the arrest were consistent with being under the influence of methamphetamine. Some of the symptoms were also consistent with the use of alcohol, but alcohol would not cause dilation of the pupils.

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[1] According to the reporter's transcript, De Veas testified that the check number on the check was "22304850." In view of Collins's subsequent testimony that the check number was 2230, and the check was for $850, it appears De Veas probably said the check was number "2230, for 850" but the court reporter interpreted his statement as "22304850."

B. *Count 4*

Count 4, for possession of a controlled substance, was based on evidence obtained from a police search of defendant. Defendant has challenged the constitutionality of the search, and we recite the facts in more detail in section II.B., *post*. A brief recitation follows.

On January 19, 2003, shortly after 11:00 p.m., Palm Springs Police Officer Rhonda Long spotted a van in a motel parking lot. As Long approached the van, the driver quickly got out, went to the back of the van, and then got back in.

Defendant was in the front passenger's seat of the van. With defendant's agreement, Long searched defendant and found a clear baggie containing an off-white substance.

Under the driver's seat of the van was another baggie containing an off-white substance. After taking defendant to the police station, Long found two pieces of plastic containing an off-white substance in her police car where defendant had been sitting. Testing showed the off-white substance in each item was methamphetamine.

II

DISCUSSION

A. *Admission of Threats Made to Carpio*

Defendant contends the court abused its discretion, and violated defendant's rights to due process and a fair trial, by admitting the testimony of Jorge Carpio concerning efforts of defendant's father and brother to persuade Carpio not to testify.

1. *Trial court proceedings*

Officer De Veas testified that about two days before trial, he spoke with Carpio about the upcoming trial. Carpio told De Veas that once when defendant was giving him a ride to work, Carpio stepped out of the vehicle and returned to find defendant looking at his identification card and Social Security number. Carpio's wallet had been in the vehicle's glove compartment. Carpio asked defendant what he was doing going through his wallet. Defendant did not answer but merely looked at Carpio and became angry.

At trial, Carpio denied making these statements to De Veas. He further denied that he ever had items pulled from his wallet when he left it in a vehicle driven by defendant and that he ever saw defendant looking at his California identification card and his Social Security card. Carpio explained the discrepancy between De Veas's testimony and his own by testifying that "they misunderstood what I told the police" and that he had actually only told the police the van was always messy.

Carpio then testified that the night before he came to court to testify, defendant's father and one of defendant's brothers came to him and told him not to come to court. They said Carpio was making defendant look bad and told Carpio to hide for a week. Defendant's brother also told Carpio "that he knew what happens to people who came to court to testify and to point the finger, that sometimes when they got home it wasn't going to be good for them." Carpio told defendant's brother that his statement did not scare him, because Carpio wasn't pointing the finger at defendant but only telling what was correct. According to Carpio, the contact did not concern him at all.

The defense objected to the testimony concerning the threats against Carpio and moved for a mistrial after the testimony was admitted. The court ruled the testimony was properly admitted but gave the following limiting instruction when it instructed the jury at the end of the case:

"Evidence has been introduced during course of this trial for the purpose of showing that a witness, Jorge Carpio, was threatened or intimidated by members of the defendant's family. However, there has been no evidence presented to show that the defendant was in any way responsible for the acts of these other individuals, and you may not consider this evidence against the defendant. To the extent that you believe such evidence, you may only use it for the limited purpose of assessing the credibility of Jorge Carpio. Please do not consider this evidence for any purpose except the limited purpose for which it was admitted."

2. *Standard of review*

An appellate court applies the abuse of discretion standard to review any ruling by a trial court on the admissibility of evidence. (*People v. Cox* (2003) 30 Cal.4th 916, 955.) An abuse of discretion occurs when the court's ruling falls outside the bounds of reason. (*People v. Catlin* (2001) 26 Cal.4th 81, 122.)

3. *Analysis*

Defendant contends the court's admission of the evidence of threats against Carpio was a prejudicial abuse of discretion under Evidence Code section 352. That section requires that the court, in deciding whether to exercise its discretion to exclude evidence, weigh the evidence's probative value against its potential to create undue prejudice.

a. *Probative value*

Defendant argues the evidence of the pretrial threats was, at best, marginally relevant and entirely unnecessary. He asserts that since Carpio had already given a statement to the police at the time the threats were made, the threats could not have had any logical bearing on the credibility of that pretrial statement.

The argument misses the point. The prosecution was not challenging the credibility of Carpio's pretrial statement to De Veas. Instead, it was challenging the credibility of Carpio's *trial testimony*, which varied significantly from his pretrial statement. The threats, which occurred one day before the testimony, obviously were highly relevant to the credibility of the testimony, and specifically to explain why Carpio changed his story when he took the stand.

Defendant argues that in fact Carpio's trial testimony did not vary significantly from his pretrial statement, but was substantially similar to it. Defendant notes that both the pretrial statement and the testimony confirmed the facts that Carpio knew defendant, Carpio had lived with defendant's parents, and defendant had access to Carpio's wallet and identification cards.

Again, defendant misses the point. While Carpio's trial testimony was, on some points, consistent with his statement to De Veas, it differed from the prior statement in a major respect: At trial, Carpio denied he had seen defendant looking at his identification card, despite having told De Veas only days earlier that he *had* seen defendant do this.

The fact defendant had looked at the identification card was an important part of the prosecution case on counts 1 and 2. The crime of possession of stolen property

requires that the defendant know the property to be stolen. (Pen Code, § 496, subd. (a).) The crime of possession of a forged check requires that the defendant have the intent to defraud. (Pen Code, § 475.)

The fact defendant had been seen looking at Carpio's identification card supported an inference that defendant had written the check. Otherwise, defendant could have claimed he did not write the check, because it contained Carpio's identification number, which defendant would have had no way of knowing. Defendant could have claimed he got the check from Carpio as payment for a debt, did not know it was stolen or forged, and had no intent to defraud.

Accordingly, the fact Carpio denied at trial -- *after* the threats had been made against him -- that he had seen defendant looking at the identification card substantially undermined the prosecution's ability to prove the mental elements required for counts 1 and 2. The prosecution was entitled to support its case by suggesting that Carpio's trial testimony was not credible because it had been influenced by the threats. The jury reasonably could have concluded Carpio's claim that the threats did not cause him any concern was not credible. Alternatively, it reasonably could have concluded that even if Carpio was not frightened by the threats, his past relationship with defendant's family influenced him to change his story after members of the family implored him not to testify. The evidence of the threats, therefore, was highly probative to support the prosecution's argument that the jury should believe Carpio's pretrial statement, not his trial testimony.

Defendant notes Carpio testified at trial that when he made his pretrial statement to De Veas, he was "answering with the truth and not telling him lies." Therefore, defendant concludes, it was unnecessary for the prosecution to further bolster the credibility of the pretrial statement by introducing the evidence of the threats. However, notwithstanding Carpio's *general* assertion that his pretrial statement was true, the fact remained that at trial Carpio specifically *denied* he had seen defendant looking at his identification and specifically denied he had told De Veas he had seen defendant doing so. Accordingly, the prosecution was entitled to present the evidence of the threats to support a contrary inference -- that Carpio changed his story due to the threats.

Defendant finally argues that the evidence of the threats was not very probative because *defendant* did not make the threats, and there was no evidence he encouraged or solicited them. As defendant points out, while a defendant's efforts to suppress testimony against himself may be used to prove his consciousness of guilt, evidence of third persons' suppression efforts may not be used to do so unless those efforts can be connected to the defendant. (*People v. Hannon* (1977) 19 Cal.3d 588, 599; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.)

Here, however, the court's limiting instruction made clear that the threats were not offered to show consciousness of guilt, but for the purpose of assessing the credibility of Carpio's trial testimony. Considered for that limited purpose, the threats were highly probative and therefore were admissible under Evidence Code section 352 unless they were unduly prejudicial. We next address that question

b. *Prejudice*

"The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. ' . . . The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Defendant asserts that California courts have not decided whether evidence of threats against a witness, with no showing of a connection between the defendant and the threats, is unduly prejudicial. Therefore, defendant relies on several Indiana decisions he says support his claim of prejudice. Defendant says that in at least one of these decisions, the court found the evidence was so prejudicial that the prejudice could not be mitigated by an instruction to disregard the evidence.

We need not discuss the Indiana decisions, because the California Court of Appeal decision in *People v. Olguin*, *supra*, 31 Cal.App.4th 1355 adequately and correctly addresses the issue of whether third-party threat evidence is unduly prejudicial. In *Olguin*, the defendants were members of the Southside gang who were accused of murdering a rival gang member. The court admitted testimony of a prosecution witness that someone telephoned him a few days after the shooting, saying they knew where he lived and he had better watch his back. When the witness asked the caller for her name, she replied, "'Don't worry about it. Go, Southside Gang.'" (*Id.* at pp. 1366-1368.) The

trial court instructed that this evidence could only be used insofar as it was relevant to the witness's state of mind in testifying. (*Id.* at p. 1368.)

The Court of Appeal rejected the contention that the threat evidence should have been excluded under Evidence Code section 352, stating: "The trial court correctly limited the evidence to 'the witness' state of mind, attitude, actions, bias, prejudice, lack or presence thereof,' and we presume the jury adhered to the trial court's limitations on this testimony. [Citations.]" (*People v. Olguin*, *supra*, 31 Cal.App.4th 1355, 1368.)

Here, similarly, the prosecution conceded, and the court instructed, that there was no evidence linking defendant to the threats made by his father and brother. The court told the jurors that since no link had been shown, they could not consider the evidence against defendant, but could only rely on it in assessing Carpio's credibility.

Defendant contends the court's limiting instruction was ineffective. He cites *People v. Gibson* (1976) 56 Cal.App.3d 119 for the proposition that it is "the essence of sophistry and lack of realism" to think that an instruction admonishing the jury to consider highly prejudicial evidence only for its limited relevant purpose can have any realistic effect. (*Id*. at p. 130.)

Gibson, however, involved the admission of evidence of other crimes committed *by the defendant*. The court concluded the evidence was so inherently prejudicial that a limiting instruction could not cure the prejudice. Here, in contrast, the threat evidence did not concern any wrongful act of defendant, or, in fact, any conduct of defendant at all. The potential for prejudice was much less than in *Gibson*.

Moreover, later authority of the same appellate district that decided *Gibson* holds that *Gibson* is "inapposite" where "[t]here is no evidence that the jury ignored the court's instructions and committed misconduct by using limited evidence for an improper purpose. 'In the absence of evidence to the contrary, the presumption [that the jury adhered to the limiting instructions] will control.' [Citation.]" (*People v. Zack* (1986) 184 Cal.App.3d 409, 416.)

There is no evidence in this case that the jury disregarded the court's limiting instruction, and the evidence of the threats was not so inherently prejudicial that a reasonable juror would be unable to abide by the instruction. We therefore presume the jury followed the instruction and did not consider the evidence against defendant. Hence, the admission of the threats evidence was not prejudicial.

c. *Due process and fair trial*

Application of the ordinary rules of evidence generally does not impermissibly infringe on a defendant's constitutional rights. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.) Defendant acknowledges this principle but contends the admission of the threats evidence in this case still violated his rights to due process and a fair trial. He cites *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967.

In *Dudley*, the United States Court of Appeals for the Seventh Circuit held that a state trial court violated the Fourteenth Amendment by admitting evidence that a prosecution witness had received anonymous phone calls the night before he testified. (*Dudley v. Duckworth*, *supra*, 854 F.2d 967, 969, 972.) The witness testified he was afraid that whoever made the calls might threaten his mother. (The witness never

explained what the caller said that caused him to view the calls as threatening.) (*Id.* at p. 969.)

Defendant claims *Dudley* is strikingly similar to this case. In fact, *Dudley* is readily distinguishable from this case on at least two grounds. First, the Court of Appeals in *Dudley* found there was a "strong possibility that the prosecutor intended to get the threat testimony before the jury under a pretext." The court came to that conclusion because the prosecutor's only ground for admitting the threat evidence was that it was relevant to explain why the witness was "nervous" about testifying. The court noted that nervousness is "not an uncommon condition affecting witnesses" and concluded that a witness's nervousness, without more, is not a valid basis for admitting otherwise prejudicial evidence. (*Dudley v. Duckworth*, *supra*, 854 F.2d 967, 971.)

Here, Carpio was not merely "nervous." He *changed his story* on the stand, hardly an act that is "not an uncommon condition" among witnesses. The threat evidence, therefore, was highly probative in determining whether Carpio's original story or his trial testimony was more credible. There was no such change of story in *Dudley*.

Moreover, defendant fails to note that unlike this case, in *Dudley* the trial court gave *no limiting instruction*. Thus, the jury was never informed it could only consider the alleged threats in assessing the credibility of the witness and not as evidence against the defendant. Under those circumstances, there was a real danger that the jury would misuse the evidence in a highly prejudicial manner.

Our Supreme Court, in fact, has repeatedly distinguished *Dudley* on precisely the two grounds just discussed. (*People v. Williams* (1997) 16 Cal.4th 153, 212; *People v.*

Wharton (1991) 53 Cal.3d 522, 566, fn. 9; *People v. Mason* (1991) 52 Cal.3d 909, 947, fn. 17.) For these reasons, we reject defendant's claim that the admission of the threat evidence was constitutional error.

B. *Denial of Motion to Suppress Methamphetamine*

Defendant contends the court's admission of the methamphetamine taken from defendant by Officer Long at the motel parking lot, and the methamphetamine found in Long's patrol car after she took defendant to the police station, violated the Fourteenth Amendment. He asserts that the encounter between defendant and the police was an illegal detention because it was neither consensual nor supported by a suspicion of criminal activity. Accordingly, all evidence discovered as a result of the encounter should have been suppressed under the "fruit of the poisonous tree" doctrine. (See *People v. Storm* (2002) 28 Cal.4th 1007, 1027-1028.)

The People respond that the encounter was not a detention, but a consensual encounter. Therefore, no suspicion of criminal activity was necessary.

1. *Trial court proceedings*

Before trial, defendant moved to suppress all evidence obtained from the police contact with the occupants of the van on January 19, 2003.

At the hearing on defendant's motion, Officer Long testified that on January 19, 2003, about 11:00 p.m., she was patrolling the area of a Motel 6 parking lot. The motel management had asked the police to pay special attention to the parking lot, because it had been the scene of a lot of drug activity.

Long saw a brown van in the parking lot, parked as far away from the motel office as it was possible to park, with no other cars around it. She could see there were people sitting in the van.

As Long drove toward the van, the person in the driver's seat quickly got out. Long thought the person was going to run. Instead, the person went to the back of the van, and then quickly got back in the driver's seat. Long turned on her police car's spotlight but did not activate any of the other lights on the car or the siren. She stopped her car to the side of the van, five to eight feet away from it.

Long could see two other people in the van. Defendant was sitting in the front passenger's seat, and there was a female sitting in the rear of the van. Defendant and the person in the driver's seat kept moving. Long was not sure what they were doing, so she called for an additional police unit.

Officer Douglas arrived at the scene. Douglas went to the driver's side of the van while Long went to the passenger's side. Neither officer drew a weapon.

Long asked the female if she would step out of the van and have a seat on the curb. She consented and sat on the curb. Douglas spoke to the driver of the van. In the meantime, Officer Reyes arrived at the scene. Reyes stood on the other side of the female, observing. He had no contact with defendant or the driver.

Long asked defendant if he had identification. Defendant refused to identify himself and said, "What the fuck are you doing?" and "Fuck you."

Long asked defendant if he would step out of the van. She did not have her hand on her weapon, nor did she order defendant out of the van. Defendant agreed and stepped out of the van.

Long asked defendant whether he had any weapons. Defendant said he did not. Long asked defendant whether he would mind if she patted him down. Defendant said, "Go ahead. You're going to do it anyways."

Based on defendant's response, Long patted him down and found a knife in his right front pocket. She felt there was something in defendant's left front pocket, so she asked him if he minded if she went into that pocket. Defendant responded, "Go ahead." In defendant's left pocket, Long found a baggie with an off-white substance, which she suspected to be methamphetamine.

The court denied the suppression motion without making any findings or stating any reasons.

2. *Standard of review*

On appeal from a motion to suppress evidence, all presumptions are in favor of the trial court's factual findings, where they are supported by substantial evidence. (*People v. White* (2003) 107 Cal.App.4th 636, 641; *People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180, 1197-1198.) Accordingly, where the issue is whether a contact was a consensual encounter or a detention, "even if the testimony upon which the [defendant] relies *might* support a finding that the encounter *was* a detention, we must view the evidence in the light most favorable to the judgment below. [Citation.] If the circumstances reasonably justify the [trial] court's finding, we cannot reverse merely

because the circumstances also might support a contrary finding. [Citation.] This rule applies equally to express and implied findings. [Citation.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 823.)

Once we have determined the relevant facts, "we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness. [Citation.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 327.) In making that determination, we are governed by federal constitutional law. (*People v. White*, *supra*, 107 Cal.App.4th 636, 642; *People v. Hoeninghaus*, *supra*, 120 Cal.App.4th 1180, 1197-1198.)

3. *Analysis*

A "detention" of an individual by a police officer requires an "articulable suspicion that the person has committed or is about to commit a crime. [Citation.]" (*In re Manuel G.*, *supra*, 16 Cal.4th 805, 821.) In contrast, "[c]onsensual encounters do not trigger Fourth Amendment scrutiny," and "require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.]" (*Ibid*.)

The fact that an officer initiates contact by approaching an individual does not make a consensual encounter a detention. (*People v. Hughes*, *supra*, 27 Cal.4th 287, 328.) "Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' [citation], the encounter is consensual and no reasonable suspicion is required." (*Florida v. Bostick* (1991) 501 U.S. 429, 434 [111 S.Ct. 2382, 115 L.Ed.2d 389].)

Accordingly, "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, [citations]; ask to examine the individual's identification, [citations]; and request consent to search his or her luggage, [citation] -- as long as the police do not convey a message that compliance with their requests is required." (*Florida v. Bostick*, *supra*, 501 U.S. at pp. 434-435.) Further, "the encounter 'does not become a "seizure" merely because the officer does not tell the person [being questioned] that he may refuse to answer the questions and is free to leave.' [Citation.]" (*U.S. v. Savage* (D.C.Cir.1989) 889 F.2d 1113, 1116.) Thus, the facts that Long approached the van and asked defendant for identification did not make the encounter a detention, unless a reasonable person would not have felt free to disregard the requests and leave the scene.

In determining whether a reasonable person would have felt free to ignore an officer's requests and leave the scene, a court "assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.]" (*In re Manuel G.*, *supra*, 16 Cal.4th 805, 821.)

Here, with the exception of the presence of several officers, none of these circumstances existed. None of the officers displayed a weapon or physically touched defendant, until he consented to a patdown search. None of them used any language or,

as far as the record reflects, any tone of voice, that would suggest defendant was required to comply with Long's requests.

The presence of several officers, while it can support a conclusion that an encounter was not consensual, does not necessarily do so. (See, e.g., *U.S. v. Mendenhall* (1980) 446 U.S. 544 [100 S.Ct. 1870, 64 L.Ed.2d 497] (opn. of Stewart, J.) [two officers approached and questioned defendant in airport]; *U.S. v. Savage*, *supra*, 889 F.2d 1113, 1115-1116 [two officers approached defendant on train and asked for identification and his train ticket].)

U.S. v. Mikulski (10th Cir. 2003) 317 F.3d 1228 involved a scenario like the one involved here. Two officers drove up to a truck parked on a street, suspecting the person in the driver's seat might be a man they were trying to locate. In the truck were a male driver, later identified as the defendant, and a female passenger. Although the officers wore plain clothes, they identified themselves and showed their badges. At some point, two additional officers joined them around the truck. (*Id.* at pp. 1229-1230.)

One of the officers asked the defendant who he was. The defendant gave a first name but stated he had no identification. The officer admitted that, other than a missing front license plate and a potential parking violation, he had no reason to believe the defendant had committed a crime. (*U.S. v. Mikulski*, *supra*, 317 F.3d at p. 1230.)

The officer asked the defendant to step out of the truck, to search him for identification and weapons. Before searching the defendant, the officer asked him if he had any weapons on his person. The defendant said he had a knife on his belt. The officer then performed a patdown search, which also revealed a pistol in the defendant's

pocket. The officer arrested the defendant for carrying a concealed firearm. (*U.S. v. Mikulski*, *supra*, 317 F.3d at p. 1230.)

On appeal, the court ruled the encounter was consensual. The court noted that the officers' vehicle did not block the defendant's path or exit; the officers "did not display a weapon or use any coercive language or tone"; the encounter took place in a public setting and in front of the truck's passenger; the detective who questioned the defendant gave him "'no reason to believe that [he was] required to answer the [detective's] questions[]'"; and the record did not indicate "that the officers behaved in a manner that was threatening." (*U.S. v. Mikulski*, *supra*, 317 F.3d 1228, 1234.) All of these circumstances were present in this case.

In contending that a reasonable person would not have felt free to ignore the police and proceed about his or her business, defendant focuses on the facts that Long stopped her car near the van, turned on her spotlight, called for assistance, received additional assistance from a third officer, approached the van in tandem with Officer Douglas, and had the female passenger get out of the van and sit on the curb before contacting defendant. Defendant also asserts his response to Long's request to pat him down -- "Go ahead. You're going to do it anyways" -- reflects the reality that a reasonable person would not have felt free to ignore Long's requests.

The fact Long stopped her car near the van was not an indicator of a nonconsensual encounter. Long testified she positioned her car to the side of the van, so that the van would have been able to drive off. There was no conflicting evidence, as Long was the only witness at the suppression hearing.

"'Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.' (Evid. Code, § 411.) 'If a trier of fact has believed the testimony . . . this court cannot substitute its evaluation of the credibility of the witness unless there is either a physical impossibility that the testimony is true or that the falsity is apparent without resorting to inferences or deductions. [Citations.]' [Citation.]" (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 578.) There was no physical impossibility or apparent falsity in Long's testimony that she did not block the van, nor in anything else to which she testified. We are therefore obliged to accept the trial court's implied finding that the van was not restrained from leaving.

Similarly, the fact Long turned on her spotlight did not make the encounter nonconsensual. In *People v. Franklin* (1987) 192 Cal.App.3d 935, an officer's shining of his spotlight on a pedestrian was held "not to represent a sufficient show of authority so that appellant did not feel free to leave . . . ." (*Id*. at p. 940.) The court observed: "Coupling the spotlight with the officer's parking the patrol car, appellant rightly might feel himself the object of official scrutiny. However, such directed scrutiny does not amount to a detention." (*Ibid*.)

We have already explained that the presence of more than one officer does not necessarily make an encounter nonconsensual. Here, it is significant that while two other officers were present, only one of them questioned defendant, and one had no role at all in questioning any of the occupants of the van.

The fact Long had the female passenger get out of the van also did not reflect a nonconsensual encounter. Long's uncontradicted testimony established that the female "consented" to exit the van and was "real cooperative."

Finally, the fact that when defendant consented to the patdown search he said Long was "going to do it anyways" did not tend to prove the encounter was a detention. Even assuming defendant thought he had no choice whether to be searched, "the individual citizen's subjective belief" is "irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. [Citation.]" (*In re Manuel G., supra*, 16 Cal.4th 805, 821.)

The decisions defendant relies on do not support his position. In *People v. Verin* (1990) 220 Cal.App.3d 551, the court concluded the encounter was a detention rather than consensual, because the officer, Perez, "*commanded*" the defendant to stop walking: "We find Perez clearly manifested his intent to detain appellant when he explicitly, unambiguously and authoritatively demanded that appellant and his companion 'Hold it. Police.' or 'Hold on. Police.' Significantly, Perez *commanded*, not *requested*, appellant to follow his order. [Citations.] Appellant reasonably had to comply with Perez's instruction." (*Id*. at pp. 556-557.)

In *People v. Roth* (1990) 219 Cal.App.3d 211, the officer said either "'I would like to talk to you'" or "'Come over here. I want to talk to you.'" (*Id.* at p. 213.) One of the two Court of Appeal justices who found there was an unlawful detention expressed doubt about whether the statement was a request or a command. However, the trial court had

found it was a command, and both justices concluded they were bound by that finding. (*Id*. at pp. 215, fn. 3, 216 (conc. opn. of Todd, J.).)

Here, there was no indication in Officer Long's testimony that any of the officers ever commanded defendant to do anything. The trial court's implied finding that the encounter was consensual is supported by substantial evidence. Accordingly, Officer Long did not need a reasonable suspicion defendant was involved in criminal activity to approach and question him, and defendant's eventual consent to the patdown search was valid. The trial court did not err in declining to suppress the fruits of that search.

C. *Cruel and/or Unusual Punishment*

Defendant contends his sentence constitutes cruel and unusual punishment in violation of the federal and state Constitutions, because it is grossly disproportionate to his current offenses. In *Ewing v. California* (2003) 538 U.S. 11 [123 S.Ct. 1179; 155 L. Ed.2d 108] (*Ewing*), a majority of the United States Supreme Court concluded either that the Eighth Amendment contains only a "narrow" proportionality principle in noncapital cases (Chief Justice Rehnquist and Justices O'Connor and Kennedy) or that it contains no proportionality principle at all (Justices Scalia and Thomas).

Under the narrow proportionality principle recognized by the plurality in *Ewing*, the Eighth Amendment does not require strict proportionality between crime and sentence and does not mandate comparative analysis within and between jurisdictions. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime. In weighing the gravity of the current offense, the court considers not only that offense,

but also the offender's criminal history. (*Ewing*, *supra*, 538 U.S. at pp. 11-12 [123 S.Ct. at p. 1180].)

Considering defendant's criminal history, his sentence was not disproportionate. Defendant admitted four prior convictions: (1) in 1997, for robbery; (2) in 1995, for first degree burglary; (3) a second count of first degree burglary in 1995; and (4) in 1993, for vehicle theft. Thus, defendant's history included three prior serious felony convictions. (Pen. Code, § 1192.7, subd. (c)(18), (19).) His status as a repeat offender made him a more serious threat to society than an offender who committed defendant's current offenses without the serious prior convictions.

A life sentence is not unconstitutional, even when the defendant's strike priors are remote in time and not inherently violent. In *People v. Goodwin* (1997) 59 Cal.App.4th 1084, for example, the court held it was not cruel and/or unusual punishment under either the federal or state Constitution to sentence the defendant to 25 years to life for shoplifting a pair of pants, based on prior strike convictions for two burglaries on a single day 13 years earlier, when he was 19 years old. (*Id*. at pp. 1093-1094.)

Here, defendant's prior convictions were worse than in *Goodwin*. One of them, the robbery, by definition involved force or fear. (Pen Code, § 211.) His current offenses were considerably worse than the single incident of shoplifting that was the current offense in *Goodwin*. Defendant committed four current offenses, and two of them appeared to be part of a plan to steal mail, forge a check to steal money from one victim, and fraudulently use the identity of another victim to avoid detection. If a three strikes

sentence was not cruel and/or unusual punishment in *Goodwin*, it was not in this case, either.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

GAUT
J.